In the Court of Appeals of the State of Alaska

Arthur Augustine, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-12659** **Order** Third Remand to the Trial Court Date of Order: **March 16, 2021**

Trial Court Case No. **4FA-12-00482CR**

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer, Senior Judge.*

Arthur J. Augustine was convicted of sexually abusing his two grand-daughters. The State's evidence against Augustine was based almost completely on the out-of-court statements of the two children. These out-of-court statements were conveyed to the jury through video-recorded interviews of the children, as well as the hearsay testimony of adults.

The trial judge admitted the children's recorded interviews under the provisions of Alaska Evidence Rule 801(d)(3). This evidence rule declares that the recorded pre-trial statement of a crime victim is exempted from the hearsay rule if the victim is under 16 years old, if the child is available for cross-examination at trial, and if the out-of-court statement was taken under circumstances that satisfy the eight criteria listed in subsections (A) through (H) of the evidence rule.

---

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Most of the eight criteria listed in Evidence Rule 801(d)(3) concern factual issues, such as whether the interview with the victim was conducted before the proceeding, and whether the victim's statement was recorded in a format that preserves both the audio and video components of the statement. But two of the criteria — (d)(3)(F) and (d)(3)(H) — explicitly require the trial judge to exercise judgement after evaluating the entirety of the circumstances surrounding the victim's statement.

Under subsection (d)(3)(F), the State must prove that "the taking of the statement as a whole was conducted in a manner that would avoid undue influence [on] the victim". And under subsection (d)(3)(H), the judge must additionally "determine that [the out-of-court statement] is sufficiently reliable and trustworthy", and that "the interests of justice are best served by admitting the recording [of the statement] into evidence."

In our first decision in this case, *Augustine v. State (I)*, 355 P.3d 573 (Alaska App. 2015), we concluded that the trial judge failed to hold the State to its burden of proof under subsection (d)(3)(F), and that the trial judge failed to fulfill his role as evidentiary gatekeeper under subsection (d)(3)(H). We therefore remanded Augustine's case to the superior court for reconsideration of whether the children's out-of-court statements should have been admitted.

The superior court reconsidered the matter and issued a decision on remand, again ruling that the children's out-of-court statements were properly admitted at Augustine's trial. But the superior court's explanation of its decision was so terse and conclusory that it was impossible for this Court to meaningfully review the court's ruling. We therefore remanded this case to the superior court a second time. *Augustine v. State* (*II*), 469 P.3d 425 (Alaska App. 2020).

Pursuant to our remand, the superior court considered the admissibility of the children's out-court-statements a third time, and again the superior court has ruled that these statements were admissible under Evidence Rule 801(d)(3).

A major aspect of the superior court's analysis was the court's finding that the expert witness who testified for the State, Lori Markkanen, was more "credible" than the expert witness who testified for the defense, Dr. John Yuille. In context, the judge's use of the word "credible" does not appear to be a finding that one of these witnesses was more truthful than the other; rather, the judge found that Markkanen's testimony was more persuasive than Yuille's testimony.

But the judge expressly stated that his finding of persuasiveness was based, not on the testimony that Markkanen and Yuille gave in Augustine's case, but instead on the testimony that these two witnesses gave in unrelated child-in-need-of-aid proceedings. This was improper. Both Augustine and the district attorney's office were entitled to demand that the judge base his ruling solely on the evidence that was presented in Augustine's case. [1]

Similarly, the judge was required to set aside any opinion he may have formed in the unrelated proceedings about the relative credibility of these two witnesses, or the weight that should be given to their respective testimony.

---

[1] *See Tuttle v. State*, 65 P.3d 884, 886–87 (Alaska App. 2002) (when judging a defendant's case, a judge must set aside all judicially-acquired information that is not admissible against that defendant). *See also Grace L. v. Office of Children's Services*, 329 P.3d 980, 988–89 (Alaska 2014) ("Trial judges are often called upon to compartmentalize their decisions — to review evidence that is later declared to be inadmissible[,] or to rule on similar legal issues at different stages of a contested case.").

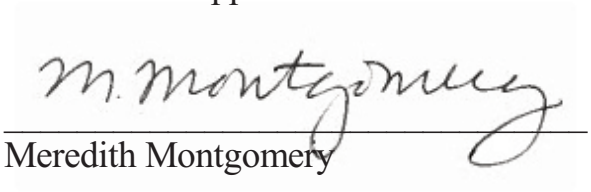
In this case, instead of disregarding the testimony given in the unrelated proceedings, and instead of setting aside any opinions the judge may have formed based on that testimony, the judge explicitly and improperly based his ruling on that testimony and on those opinions.

Moreover, other than the judge's improper reliance on the testimony given in the unrelated proceedings, the judge failed to offer any explanation of why he concluded that Ms. Markkanen's opinion was more persuasive than Dr. Yuille's opinion. This is the same flaw that required our earlier remand in *Augustine II*.

Accordingly, we must again remand this case to the superior court. We direct the superior court to reconsider the question of whether the children's police interviews were admissible at Augustine's trial under Evidence Rule 801(d)(3). The court shall make further findings related to this issue, and shall transmit those findings to us within 60 days of this order. This deadline may be extended for good cause.

Entered at the direction of the Court.

Clerk of the Appellate Courts



Meredith Montgomery

cc: Judge McConahy
Trial Court Clerk - Fairbanks
Distribution:

Email:
Barr, Sharon, Public Defender
Wendlandt, Diane L.